Supreme Court, U.S.
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No. 91-618

In The
Supreme Court of the United States
October Term, 1991

Daniel P. SHEEHAN, Esq.
Petitioner,

versus

John HULL, Richard Secord, Albert Hakim, Thomas Clines, Adolfo Calero, Robert Owen, John Singlaub, Theodore Shackley, Rafael "Chi Chi" Quintero, Ronald Joseph Martin, Sr., Mario Delamico, James McCoy, Moises Nunez, and Jorge Gonzalez,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITIONER DANIEL P. SHEEHAN'S REPLY TO THE RESPONDENTS' JOINT CONSOLIDATED BRIEF IN OPPOSITION

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PETITIONER DANIEL P. SHEEHAN'S REPLY TO THE RESPONDENTS' JOINT CONSOLIDATED BRIEF IN OPPOSITION

I. Reply to Respondents' Argument I

In their Opposition to Attorney Daniel Sheehan's Petition for Writ of Certiorari, the Respondents contend that this Court's 1990 holding in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990) legally forecloses virtually any appellate review of the factual record below to determine whether a finding of fact made by a District Court in support of a Rule 11 Order of Sanction was supportable - assuming said finding is deemed by the Court to be a "finding of fact."

However, this Court's holding in *Cooter & Gell* does not preclude a detailed review by an appellate court of the factual record below to determine whether a finding of fact made by a district court in support of a Rule 11 order is supportable. *Cooter & Gell* simply decided that such a detailed review of the factual record below by an appellate court would have to result in a determination by that appellate court that the district court had abused its discretion in arriving at a given finding of fact (as distinguished from a determination that the District Court was simply incorrect in its finding) - before the appellate court could reverse such a finding of fact. Even a cursory review by an appellate court of the factual record of the case below reveals that the district court did abuse its discretion in finding that Sheehan possessed no evidence to support a good faith belief that Defendant Hull had hired Defendant Amac Galil to carry out the May 1984 assassination attempt against Eden Pastora, as a member of an on-going federal criminal racketeering enterprise of which each of the defendants named was a knowing and active member at the time of the 1984 La Penca bombing. Sheehan contends that such a determination by an appellate court is virtually mandated by the record of the undisputed evidence shown to have been possessed by Sheehan at the time of the filing

of his complaint in May of 1986 to support this good faith belief - even if that evidence was in the form of hearsay statements and information that was not in a court-admissible form at the time his complaint was filed, and even if those few pieces of evidence challenged by the Respondents as having been "fabricated" by Sheehan in his December 1986 Affidavit are entirely excluded.

Sheehan argues, secondly, in his Petition asking this Court to review the Rule 11 order imposed against him, that Judge King's "finding" that Sheehan filed a 1986 civil complaint against the Respondents "without having any reasonable belief at the time of the filing of the complaint that the complaint was well-grounded in fact was a legal ruling, and not a "finding of fact" at all. The district court stated that this "finding" was explicitly predicated directly upon its determination that Sheehan had filed his 1986 civil complaint "without having in his possession any competent, first-hand evidence establishing the theory of his complaint," and, therefore, Sheehan must not have had any reasonable expectation of being able to develop competent, first-hand evidence through legal discovery at the time he filed his complaint. Petitioner Sheehan submits that this ruling of law (i.e., that an attorney must have in his possession at the time of the filing of a civil complaint "competent, first-hand evidence to support the theory of his complaint") is clearly erroneous and is directly contrary to the state of the law which authorizes an attorney to file a civil lawsuit predicated exclusively upon hearsay evidence or upon other evidence which is not in a court-admissible form at the time of the filing, so long as the attorney is able to form a reasonable belief that the factual allegations he sets forth in his complaint are true.

In his Petition, Sheehan makes an additional argument in support of his contention that the district court's "finding" that Sheehan filed the 1986 civil complaint against the Respondents "without having any reasonable belief at the

time of the filing of the complaint was well-grounded in fact" was, in fact, a legal ruling subject to *de novo* review by this Court - and not a "finding of fact" entitled to any degree of non-reviewable forbearance on the part of an appellate court. This second argument is Sheehan's contention that the district court plainly based its "finding" that Attorney Sheehan "possessed no competent, first-hand evidence establishing the theory of his complaint" directly on its earlier June 1988 Rule 56 review of evidence. On the basis of that review, the district court concluded that neither the plaintiffs nor Attorney Sheehan had any evidence to sustain their contention that Defendant Hull had hired Defendant Amac Galil to assassinate the dissident Contra leader, Eden Pastora or that Defendant Hull had recruited the assassin in Hull's capacity as a member of an on-going federal criminal racketeering enterprise of which any of the Respondents was a member. The district court reached this conclusion simply because Sheehan had allegedly failed to present any such evidence directly to it in the form of sworn affidavits, officially certified government documents, certified translated document or sworn depositions in May of 1988 in the Opposition to the Defendants' Rule 56 Motions For Summary Judgment.

Respondents argue that the district court's "finding" need not be considered a legal ruling which is totally derivative of its June 1988 Rule 56 review of evidence presented by Sheehan since it is possible to infer that Judge King arrived at his "finding" by, instead, "importing" his separate finding that Sheehan had misrepresented certain witnesses in the December 1986 Affidavit into the finding that Sheehan had "no reasonable belief."

Sheehan's Reply to this Opposition argument is that A) a District Court's plainly erroneous legal ruling given in support of a Rule 11 order is not entitled to any degree of presumptive legitimacy which should require an appellate court to "infer" some factually different ground as support for

said Rule 11 legal ruling than that which is explicitly given by the District Court in its Order, and B) a "bad faith" factual finding that is made by a District Court which goes to the comparative credibility of legal counsel and non-cross examined affiants and which attributes scienter and bad faith to a practicing attorney without according him the type of due process evidentiary hearing which was required by this Court in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1979) cannot legally be allowed to be "imported" into a Rule 11 order of sanction and substituted as a "finding of fact" which supports the imposition upon a practicing attorney pursuant to Rule 11 of the full costs and full attorneys fees of his opponents - when such a bad faith finding should require such a hearing.

Presuming that both of their first two arguments made to shelter the Rule 11 order from review will fail, thus requiring this Court to undertake a detailed review of the factual record below and to arrive at the obvious conclusion that the Rule 11 "finding" of "no reasonable belief" on the part of Sheehan was a purely legal ruling predicated squarely upon the earlier June 1988 Rule 56 ruling that neither Sheehan nor his clients had any competent, first-hand evidence to sustain their charges made against the Respondents in their 1986 complaint, the Respondents - for the first time in the history of this almost three-year old appellate process - undertake to argue that they did positively "demonstrate" in support of their May 1988 motion for summary judgment, that the petitioners had no evidence that any of the Respondents "caused" the La Penca bombing. This long-delayed, purported "demonstration" consists of directing this Court's attention to four specific submissions made by Defendant Shackley in support of his motion for summary judgment and reference to two submissions made by Defendant Rob Owen in support of his Rule 56 motion. The submissions with respect to Defendant Shackley were:

1. Defendant Shackley's statement of Material Facts Not in Dispute (which Respondents contend were never "controverted"by the plaintiffs);

2. Plaintiffs' Response to Defendant Shackley's Second Request for Production of Documents;

3. Plaintiffs' Answers to Defendant Shackley's Interrogatories;

4. The affidavits of eighteen people whom plaintiffs described as being in a position to know of any involvement by Defendant Shackley in Contra-related activities - which affidavits contain explicit denials of any first-hand knowledge by the affiants of any involvement of Shackley in the activities against the plaintiffs alleged in the complaint;

Attorney Sheehan's Reply to each of these arguments is as follows:

1. Plaintiffs did respond directly to Mr. Shackley's statement of material facts not in dispute in their Opposition to Shackley's renewed motion for summary judgment, and filed sworn testimony directly contradicting assertions made by Shackley in his statement of material facts. The plaintiffs, thereby, created a genuine issue of material facts in dispute. R17.635. Plaintiffs later supplemented this opposition with a filing that included the 500 page sworn affidavit of Edwin Wilson which further contradicted Shackley's assertions. R29.995.

2. Plaintiffs supplemental response to Shackley's renewed motion for summary judgment included a declaration demonstrating that at the time of the document request, as throughout the entire course of the lawsuit, Shackley had himself obstructed discovery by refusing to supply responses to plaintiffs' discovery requests. *Id.* Instead, Shackley filed a

motion for summary judgment each time he was presented with a discovery request, and used the pendency of the motion as a basis for not producing documents.

3. In their response to Mr. Shackley's second production request, plaintiffs named more than twenty five witnesses believed to have first-hand knowledge about certain allegations made against Shackley in the complaint. R16.595, Ex. C. In addition, plaintiffs named dozens of additional witnesses with knowledge about the enterprise's activities as alleged in the complaint, and applied them to Shackley under the RICO provisions. (*Id.*)

4. Plaintiffs' opposition to Shackley's renewed motion for summary judgment contained excerpts of sworn testimony which set forth evidence supporting the allegations made in the complaint against Shackley. R16.595. Furthermore, Plaintiffs supplemented this opposition with a filing supported by seventeen exhibits of testimony and documentation which raised issues of material fact concerning Shackley's participation in the RICO enterprise. R29.995.

Respondents argue in their Opposition that their Rule 56 filings "both negated the causation element and pointed out petitioner's failure to produce sufficient evidence to create a genuine issue of fact as to causation." A cursory examination of Respondents Rule 56 motion papers, including those of Mr. Owen, demonstrate that those papers were plainly conclusory, bare-boned and in no way adequately controverted the evidence possessed by plaintiffs. Mere denial by a moving defendant of the allegations made by a non-moving plaintiff is not sufficient to meet the movant's burden. *McKinney v. Dole*, 765 F.2d 1129, 1135 (D.C. Cir. 1985).

II. Reply to Respondents' Argument II

Respondents contend that Petitioner Sheehan submitted a sworn affidavit to the Court which Judge King found "set forth seventy-nine witnesses whom Sheehan represented possessed knowledge that the defendants placed the bomb that injured the plaintiff" - but who, when the court compelled disclosure of the identities of these witnesses, turned out to be sources many of whom did not exist, whose names were not known to Mr. Sheehan, who had never personally spoken to Mr. Sheehan or who denied first-hand possession of the information attributed to them by Mr. Sheehan.

In the Sheehan Petition for Certiorari, this Court's attention was directed to evidence in the record below demonstrating that Judge King's factual findings with regard to Sheehan's affidavit are simply factually incorrect - and incorrect to a degree that exceeds any reasonable degree of "discretion" placed in the hands of a district court by this Court in *Cooter & Gell*, given the objective nature of the factual evidence in the record below.

In addition, Sheehan pointed out to the Court that the nature of the factual findings made against him by the district court was precisely the nature of factual findings which this Supreme Court has held in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1979) require a full evidentiary hearing prior to their establishment, since they involve issues of comparative credibility, good faith and motive. Sheehan argued, therefore, that these findings made as a "condition precedent" to the entrance of the Order of Sanctions against him were constitutionally precluded by this Court's holding in *Roadway Express* since Sheehan was never accorded any such evidentiary hearing.

In their Opposition to Sheehan's Petition the Respondents argue, first, that Attorney Sheehan was not constitutionally entitled to such an evidentiary hearing prior

to the imposition of a $1,200,000.00 punitive sanction against him because Sheehan did not expressly request such an evidentiary hearing in writing from the District Court, as is allegedly mandated by Local Rule 10.B.1 of the Southern District of Florida.

With regard to the Respondents' argument that "respondents' motions for attorneys' fees and costs put all petitioners, including Mr. Sheehan, on notice of the amount and type of sanctions sought and the legal and factual grounds for them," repeated intensely adversarial motions for sanctions filed by the respondents characterized the entire history of the litigation below - and all of those motions had previously been summarily rejected by the District Court. In light of this history, it is totally unsupportable to contend that the mere filing of one more such motion by these respondents - especially in light of the extraordinary nature of this particular motion - put Sheehan "on notice" that he had to file a written request to be given a full evidentiary hearing in order to stave off a personal Bad Faith Order of Sanctions equal to the total costs and attorneys' fees of the respondents. Under these circumstances, Sheehan's failure to avail himself of the Rule may not be viewed as an informed waiver of his right to a hearing.

For a waiver of a constitutional right to be effective it must be clearly established that there was an intentional relinquishment of a known right. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). Respondents have made no such showing. Moreover, the district court granted hearings to the respondents on a number of motions without a written request. (*See e.g.* R49.1177; R42.546.)

Finally, Respondents assert that the District Court's findings pass due process muster. But not only are the findings deficient in terms of specificity but they contain no delineation of what sanctioning authority applies to what perceived misconduct. The District Court used bad faith "findings of fact" to bolster its Rule 11 Order, Rule 11

arguments to bolster its "exception" order and Rule 56 methodology to bolster both - thus making it extremely difficult to decipher which elements of alleged misconduct supported which aspect of its Orders. The respondents defend the District Court's conduct by an entirely inapposite quotation from this Court's opinion in *Chambers v. NASCO*, 111 S. Ct. 2123 (1991): "[i]n circumstances such as these in which all of a litigant's conduct is deemed sanctionable, requiring a court first to apply rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power . . . is contrary to the aim of the rules themselves." *Chambers*, 111 S. Ct at 2136. In *Chambers*, this Court was merely saying that a court need not invoke specific sanctioning authorities available to it, prior to imposing bad faith sanctions pursuant to its inherent authority. *Chambers* involved a plaintiff sanctioned solely pursuant to the bad faith exception; in the quotation cited by Respondents, this Court was merely responding to petitioner Chambers' argument that Rule 11 and §1927 should displace a court's inherent power to sanction under the bad faith exception. *Chambers* established that a court may use solely its inherent power to sanction. Nevertheless, if it chooses to use several different authorities, it must make specific findings to support each. As the Third Circuit recently explained:

> [T]he court did not identify and relate the violations to each source of authority in a way that would permit meaningful appellate review with respect even to Rule 11. This infirmity is a critical obstacle because Rule 11 and §1927, while probably duplicitous to some extent, cover different actions in a lawsuit and require the application of disparate standards of proof.

Jones v. Pittsburgh National Corporation, 899 F.2d 1350, 1358 (3rd Cir. 1990).

III. Reply to Respondents' Argument III

In his Petition asking this Court to review the $1,200,000.00 §1927 Order of Sanctions imposed against him for "multiplying proceedings" against the respondents, Sheehan argued that 28 U.S.C. §1927 was created with the intention of imposing only the minimum reasonable sanction upon an attorney necessary to deter him from repeating his specific conduct of "multiplying proceedings." See *U.S. v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1347 (9th Cir. 1985). Judge King's Order woodenly imposed the full costs and attorneys fees incurred by the defendants throughout the entire course of the case below upon Sheehan while the only specific conduct the court referred to which "multiplied proceedings" was Sheehan's resistance to certain specific discovery motions demanding the identity of the sources of some of his information.

To this objection, the Respondents cite *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985) which they argue establishes the principle that a district court is granted the authority by §1927 to impose an award equal to the full attorneys' fees and costs incurred by a defendant upon a finding that the original complaint itself was "baseless." However, *In re TCI, Ltd.* considered this issue only in dicta. In fact, the 7th Circuit upheld the lower court's decision not to award §1927 sanctions from the beginning of the suit. In re TCI, Ltd., 769 F.2d at 449.

December 31, 1991

Respectfully submitted,

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